IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

TERRY CUTRIGHT and JOHN WILSON
on behalf of themselves and others
similarly situated,

Plaintiffs,

v. **CIVIL ACTION NO. 2:16-cv-06346**

MAYOR DANNY JONES, individually
and in his official capacity, THE CITY
OF CHARLESTON, and its division
THE CHARLESTON POLICE DEPARTMENT,

Defendants.

MOTION TO DISMISS

NOW COME the Defendants, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and move this Honorable Court to dismiss all claims against them as a matter of law. In support of their Motion, the Defendants file the attached memorandum of law and state as follows:

1. Plaintiffs' unreasonable seizure claims should be dismissed because Plaintiffs did not have a reasonable expectation of privacy sufficient to invoke the protections of the Fourth Amendment or the West Virginia Constitution in the personal property they stored on private property they were occupying without the landowner's permission.
2. Plaintiffs' Section 1983 claims should be dismissed because they have not demonstrated that Defendants' policies or customs deprived them of their constitutional rights.
3. Plaintiffs' state law claims should be dismissed because the City is immune from liability for the method of providing law enforcement or police protection pursuant to

the law enforcement immunity provisions contained within the Governmental Tort Claims and Insurance Reform Act, W.Va. Code §29-12A-5(a)(5).

4. Defendant Mayor Danny Jones is entitled to qualified immunity for alleged violation of the Fourth and Fourteenth Amendments to the United States Constitution because his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person in the position of the Defendants would have known.
5. Defendant Mayor Danny Jones is entitled to qualified immunity under West Virginia law for alleged violations of the West Virginia Constitution because his alleged conduct did not violate clearly established constitutional rights.
6. Plaintiffs cannot demonstrate a violation of their procedural due process rights because they did not have a property interest in tents and other personal property located on private property without the landowner's permission.

WHEREFORE, Defendants respectfully request that this Honorable Court dismiss all claims against them with prejudice as a matter of law.

MAYOR DANNY JONES, THE CITY OF CHARLESTON and THE CHARLESTON POLICE DEPARTMENT,
By Counsel

/s/ Karen Tracy McElhinny___________________
Karen Tracy McElhinny (WVSB #7517)
Kimberly M. Bandy (WVSB #10081)
Attorneys for Defendants
Shuman, McCuskey & Slicer, PLLC
P. O. Box 3953
Charleston, WV 25339
Telephone: (304) 345-1400
Facsimile: (304) 343-1826
Email: kmcelhinny@shumanlaw.com

kbandy@shumanlaw.com
and

/s/ Paul D. Ellis______________________
Paul D. Ellis, Esq. (WVSB #8726)
City of Charleston
P.O. Box 2749
Charleston WV 25330
(304) 348-8031
Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

TERRY CUTRIGHT and JOHN WILSON
on behalf of themselves and others
similarly situated,

Plaintiffs,

v. **CIVIL ACTION NO. 2:16-cv-06346**

MAYOR DANNY JONES, individually
and in his official capacity, THE CITY
OF CHARLESTON, and its division
THE CHARLESTON POLICE DEPARTMENT,

Defendants.

CERTIFICATE OF SERVICE

I, Karen Tracy McElhinny / Kimberly M. Bandy, counsel for Defendants, do hereby certify that a true and correct copy of the foregoing "Defendants' Motion to Dismiss" was filed on November 10, 2016 utilizing the Court's ECF Filing System which will provide a copy of same to:

Samuel B. Petsonk, Esq.
Gary M. Smith, Esq.
Mountain State Justice, Inc.
1031 Quarrier Street, Suite 200
Charleston, WV 25301

and

Lydia C. Milnes, Esq.
Mountain State Justice, Inc.
215 S. Third St., Ste. 901
Clarksburg, WV 25301
Counsel for Plaintiffs

/s/ Karen Tracy McElhinny____________________
Karen Tracy McElhinny (WVSB #7517)
Kimberly M. Bandy (WVSB #10081)
Attorneys for Defendants
Shuman, McCuskey & Slicer, PLLC
P. O. Box 3953
Charleston, WV 25339
Telephone: (304) 345-1400
Facsimile: (304) 343-1826
Email: kmcelhinny@shumanlaw.com
kbandy@shumanlaw.com